No. 80-202

FEB 26 1981
ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN EXPRESS COMPANY,
Petitioner,

v.

LOUIS R. KOERNER, SR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

JOINT APPENDIX

RONALD J. GREENE
JOHN B. MCNEECE III
JUDITH BAILEY
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioner

LOUIS R. KOERNER, JR.
1204 Jackson Avenue
New Orleans, Louisiana 70130
(504) 566-0546

Counsel for Respondent

Petition for Writ of Certiorari Filed August 11, 1980
Certiorari Granted on January 12, 1981

TABLE OF CONTENTS

	Page
I. Relevant Docket Entries in the District Court	1a
II. Relevant Docket Entries in the Court of Appeals	5a
III. Appendices to the Petition for Writ of Certiorari, Incorporated by Reference	9a
IV. Relevant Pleadings, Findings, Recommendations and Other Items from the Record	13a
1. The Complaint in the District Court, October 3, 1976	15a
2. Defendant's Motion for Summary Judgment, January 11, 1977	23a
3. Defendant's Statement of Uncontested Material Facts, with Exhibits, Undated	25a
4. Plaintiff's Opposition to Statement of Uncontested Material Facts, February 1977	30a
5. Minute Entry for Conference, March 30, 1977	32a
6. Defendant's Interrogatories, March 31, 1977	34a
7. Plaintiff's Answers to Interrogatories, May 3, 1977	40a
8. Report and Recommendation of the United States Magistrate, July 22, 1977	45a
V. Order of Supreme Court granting Petition for Writ of Certiorari	53a

I. Relevant Docket Entries

in

Louis R. Koerner, Sr., *et al.*

v.

American Express Company

No. 76-3660-D(3) (E.D. La.)

Date	Filings, Orders, and Proceedings
1976	
November 22	Plaintiff Louis R. Koerner, Sr. files Complaint (Reprinted herein at 15a-20a).
1977	
January 11	Defendant American Express files Motion for Summary Judgment (Reprinted herein at 23a-24a), Accompanied by Statement of Uncontested Facts (Reprinted herein at 25a-29a).
January 27	Motion for Summary Judgment is referred to United States Magistrate.
February 4	Plaintiff files Opposition to Defendant's Motion for Summary Judgment.
February 4	Plaintiff files Opposition to Defendant's Statement of Uncontested Facts (Reprinted herein at 30a-31a).
March 31	Defendant files Interrogatories to Plaintiff (Reprinted herein at 34a-39a).
May 9	Plaintiff files Answers to Interrogatories (Reprinted herein at 40a-44a).
May 12	Defendant files Supplemental Memorandum in Support of Motion for Summary Judgment.
June 1	Plaintiff files Reply to Defendant's Supplemental Memorandum
July 22	Entry of Order and Recommendation of United States Magistrate, recommending that Motion for Summary Judgment by Defendant be Granted (Reprinted herein at 45a-51a).

PREVIOUS PAGE WAS BLANK

Date	Filings, Orders, and Proceedings
1977	
August 3	Plaintiff files Memorandum in Opposition to Recommendation of the United States Magistrate.
August 16	Defendant files Memorandum in Support of Recommendation of the United States Magistrate.
December 8	Entry of Memorandum Opinion and Order by the District Court. Defendant's Motion for Summary Judgment is Granted (Reprinted in Appendix C to the Petition for Certiorari).
December 9	Entry of Judgment. Ordered that Judgment be in favor of Defendant American Express and against Plaintiff, dismissing Plaintiff's Complaint (Reprinted in Appendix D to the Petition for Certiorari).
December 19	Plaintiff files Motion to Alter or Amend the Judgment and/or for a New Trial.
December 30	Defendant files Memorandum in Opposition to Plaintiff's Motion to Alter or Amend the Judgment and/or for a New Trial.
1978	
January 4	Hearing. Motion of Plaintiff to Alter or Amend the Judgment—Denied; Motion of Plaintiff for New Trial—Denied.
January 4	Plaintiff files Notice of Appeal.

II. Relevant Docket Entries

in

Louis R. Koerner, Sr., *et al.*

v.

American Express Company

No. 78-1290 (5th Cir.)

Date	Filings, Orders, and Proceedings
1978	
January 4	Appellant Louis R. Koerner, Sr. files Notice of Appeal.
May 3	Appellant files Opening Brief.
June 30	Appellee American Express files Brief in Opposition to Opening Brief.
July 21	Appellant files Reply Brief.
1979	
December 10	Oral Argument.
1980	
April 7	Entry of Opinion and Judgment, Reversing and Remanding the Judgment to the District Court (Reprinted in Appendix A to the Petition for Certiorari).
April 21	Appellee files Motion for Rehearing en banc.
May 12	Entry of Order denying Motion for Rehearing en banc (Reprinted in Appendix B to the Petition for Certiorari).
May 20	Entry of Order directing Clerk to issue Mandate.
August 11	Appellee files Petition for Writ of Certiorari.
1981	
January 12	Entry of Order granting Petition for Writ of Certiorari (Reprinted herein at 55a).

PREVIOUS PAGE WAS BLANK

III. Appendices to the Petition for Writ of Certiorari

PREVIOUS PAGE WAS BLANK

The following Appendices to the Petition for Writ of Certiorari are incorporated herein by reference:

Appendix A—Opinion and Judgment of the Court of Appeals

Appendix B—Order of the Court of Appeals Denying Petition for Rehearing en Banc

Appendix C—Memorandum Opinion and Order of the District Court

Appendix D—Judgment of the District Court

Appendix E—Sections 104(1) and 161 of the Truth-in-Lending Act, 15 U.S.C. §§ 1603(1) and 1666 (1976)

Appendix F—Section 226.3(a) of Regulation Z, 12 C.F.R. § 226.3(a) (1980)

Appendix G—Federal Reserve Board Public Information Letters Pertaining to the "Business or Commercial Purpose" Exemption

PREVIOUS PAGE WAS BLANK

IV. Relevant Pleadings, Findings, Recommendations and Other Items from the Record

PREVIOUS PAGE WAS BLANK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No.

SECTION: " "

LOUIS R. KOERNER, SR., Individually and on behalf of all others similarly situated

versus

THE AMERICAN EXPRESS COMPANY

COMPLAINT FOR DAMAGES
JURY DEMAND
CLASS ACTION

JURISDICTION AND VENUE

1. The jurisdiction of this Court is invoked pursuant to the provisions of 28 USC Secs. 1331, 1332, and 1337, together with the provisions of 15 USC 1640(e). The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

2. The wrongful acts which are described hereinafter have been in whole or in part conceived, carried out, and made effective in the Eastern District of Louisiana, and many of the injurious acts pursuant thereto have been performed in this district. Defendant transacts business in this district.

NATURE OF THE PROCEEDINGS

3. This is a civil action brought by the plaintiff on his own behalf and on behalf of others similarly situated for damages and for injunctive and equitable relief. Plain-

PREVIOUS PAGE WAS BLANK

tiff further seeks relief against the continuation of the pattern of deliberate violations of the provisions of 15 USC 1666, and of retaliation against cardholders who seek in good faith to utilize the provisions of 15 USC 1666 and of other users and would-be users of this provision. This proceeding is also to recover monetary damages, compensatory and punitive, and the attorney's fees necessary for the prosecution of this case from the named defendant for violations of the rights provided by Chapter 41 of Title 15 of the United States Code to plaintiff and the members of the classes. Plaintiff also seeks damages pursuant to Louisiana law for breach of contract and for damages caused by delict.

4. Plaintiffs seek injunctive relief requiring defendant to terminate with regard to the plaintiff and the members of the class its continued violations of the aforesaid laws, in depriving the class plaintiff of his right to utilize these provisions of law.

DESCRIPTION OF THE PARTIES

5. Plaintiff is a citizen of the State of Louisiana.

6. Defendant is a corporation organized under the laws of a state other than Louisiana, and with its principal place of business in a state other than Louisiana.

CLASS ACTION

7. Plaintiff brings this action on behalf of himself and as representative of and for and on behalf of all others similarly situated, to wit: persons and organizations who are cardholders of the defendant and who wish to use, now and in the future, the provisions of 15 USC 1666. Plaintiff brings this action on behalf of the subclass of cardholders who in attempting to utilize the provisions of 15 USC 1666 have been caused injury by violations by the defendant of the provisions of that statute.

8. This class action is brought pursuant to Rule 23 (a), b(1, 2, and 3) of the Federal Rules of Civil Procedure. The classes set forth above are geographically diverse, and the classes are so numerous that joinder of all members is impracticable; that the questions of law and fact, as set forth hereinafter, are common to the members of the class; that these questions are typical of the claims of the class, and plaintiff will fairly and adequately represent the interests of the various classes. The defendant has acted and is continuing to act on grounds generally applicable to the members of the class, thus making appropriate final injunctive relief or declaratory relief with respect to the class as a whole.

GENERAL STATEMENT

9. Plaintiff, through John R. Koerner Company, Inc., of which he is an officer, has been a cardholder of defendant American Express Company since 1965, with a present account number of 029 004 084 9 101AX.

10. There has been a dispute regarding the account since approximately April of 1975 concerning automatic billings for flight insurance and concerning renewal charges for two other company cards which were specifically not renewed. The amount in dispute totals some $55.00.

11. Defendant has been notified on many occasions of the billing errors, and in fact acknowledged the unauthorized nature of the automatic insurance coverage, that last notification having taken place by letter dated August 10, 1976. Copies of that letter and of prior correspondence is annexed as Exhibit A.

12. Plaintiff was scheduled to fly from New Orleans to San Antonio aboard Eastern Flight #554 on September 28, 1976 departing at 12:54 P.M., and in accordance with Eastern's suggestion, arrived at New Orleans In-

ternational Airport at around 11:15 A.M. on that date to pick up the ticket.

13. Upon presentation of the defendant's card, the ticket agent disappeared and returned at approximately 11:30 A.M. to request that plaintiff talk by telephone to a Mrs. O'Shay of the Phoenix office of defendant. The credit cards were to be withdrawn on account of alleged delinquency. Plaintiff used another credit card to purchase his ticket, but was refused the return of the said credit card, whereupon after another discussion with Mrs. O'Shay, plaintiff obtained the return of the card cut in half.

14. At this point, it was within five minutes of flight time, and plaintiff had to rush to make the flight, because no subsequent flight would have permitted him to make the dinner appointments which had previously been arranged.

15. Plaintiff is informed and believes and upon such information and belief alleges that the reason for the cancellation of the utilization of defendant's card was in retaliation for the refusal of plaintiff to capitulate to payment of unauthorized charges and the making of the many complaints to defendant in an attempt to rectify the continuing billing errors.

16. Plaintiff is further informed and believes and upon such information and belief alleges that this is a general practice of the defendant, and that it has been continued, despite the prohibition specifically set forth by 15 USC 1666, to the detriment of the class member cardholders, either through the result of being forced to make payments for disputed items or on account of the revocation of the utilization of the card in a situation such as that set forth hereinabove. The basis for such information and belief is the conduct of the defendant in failing to comply with this statutory enactment for a

period of over one year, and the attitude of defendant's agent, Mrs. O'Shay, which indicated that this conduct by the defendant was a part of a general course of action taken by the defendant in such circumstances of alleged billing errors.

VIOLATIONS OF CONSUMER CREDIT PROTECTION LAW

17. The actions of the defendant constituted specific violations of the provisions of 15 USC 1637 as made applicable by 15 USC 1666 in that it caused the revocation of the said credit card despite notification of the billing error and without compliance on the part of the defendant of its obligations under the said 15 USC 1666 et seq. to explain the alleged billing error.

18. The said violations and the pattern of violative conduct result in civil liability under 15 USC 1640 for the failure to disclose, plus a reasonable attorney fee, as well as for the civil penalty set forth in 15 USC 1666(e).

VIOLATIONS OF LOUISIANA LAW

19. The actions of defendants, as set forth in detail hereinabove, acting individually and in concert constitute unfair and deceptive acts and practices in the conduct of trade and commerce, and are accordingly unlawful and in violation of L.S.A.R.S. 51:1405, et seq.

20. The actions of defendants, as set forth hereinabove, constitute violations of the laws of Louisiana regarding the contractual obligations which issuers of credit cards undertake with regard to the classes to conduct their business a manner so that plaintiff and the class could utilize their cards without the threat of unauthorized withdrawal thereof.

21. The actions of the defendant, its agents and employees, constitute violations of the provisions of the Louisiana Civil Code, Articles 2315-2316 thereof in that the said actions whether intentional or negligent have caused damage to plaintiffs and the members of the class to whom defendant owed a duty to refrain from such activity with regard to the use of the said card.

DAMAGES AND OTHER RELIEF SOUGHT

22. As a result of the activities complained of herein, plaintiff has suffered actual damages, including inconvenience, mental anguish, grief, aggravation, and humiliation; that plaintiff has a heart condition and fears that aggravation caused by the activities of the defendant will result or has resulted either in a heart attack or in a deterioration of his heart condition.

23. Plaintiff does not know the full extent of the damages, but believes that each individual plaintiff class member has suffered damages and that the members of the subclass who have had the same experience of unlawful withdrawal of the use of the card under the same circumstances have also suffered damages in excess of $10,000.00, and that many have suffered far greater damages because of the conduct of the defendants in preventing certain class members from being able to use their cards and having such cards taken away under the most embarrassing and humiliating conditions. The members of the class are all entitled to damages in accordance with the provision of Chapter 41 of Title 15 USC. At such time as plaintiff and the members of the classes have ascertained more clearly the extent of damages, they will seek leave to amend to specifically set such damages forth.

24. Pursuant to the provisions of the Consumer Credit Protection Laws, plaintiff is entitled to, after due proceedings, a permanent injunction enjoining the defendants,

and those working on behalf or in concert with them from continuing violations of such laws.

JURY TRIAL

25. Plaintiff demands trial by jury on all issues properly so triable.

WHEREFORE, plaintiff demands judgement declaring that the defendant is in violation of the Consumer Credit Protection laws and for judgment in the amount of $25,000.00 actual damages for himself and such damages as may be due to each of the subclass members, plus damages for the entire class in accordance with the Consumer Credit Protection Act, plus reasonable attorney's fees, that on injunction be issued restraining further violations of the Consumer Protection Act by defendant, for trial by jury, and for all just and equitable relief.

Dated: 10/3/76

KOERNER, BABST & LAMBERT
A Professional Law
Corporation

By: _____

LOUIS R. KOERNER, JR.
730 Camp Street
New Orleans, La. 70130
(504) 581-9569

VERIFICATION

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared: Louis R. Koerner, Sr., who being duly sworn, did depose and say that he is the plaintiff

herein; that he has read the allegations of the complaint, and all of the facts contained therein are true and correct to the best of his knowledge, information, and belief; that affiant is informed and believes that the allegations made upon information and belief are true, and that the sources of the knowledge from which the information and belief are drawn are correspondence between his company and defendant and his conversation with Mrs. O'Shay of American Express Company.

Sworn to and subscribed before me, this — day of ————, 1976

LOUIS R. KOERNER, SR.

Notary Public

Please Serve:

THE AMERICAN EXPRESS COMPANY
Through CT Corporation
1300 Hibernia Bank Bldg.
New Orleans, La. 70112

[The complaint as filed with the District Court did not contain a copy of Exhibit A].

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-3660

SECTION "D"

LOUIS R. KOERNER, SR.,
Plaintiff

versus

THE AMERICAN EXPRESS COMPANY,
Defendant

Filed: _____ _____
Deputy Clerk

MOTION FOR SUMMARY JUDGMENT

Defendant, The American Express Company, moves this honorable Court for an Order granting summary judgment dismissing this matter on the grounds that Louis R. Koerner, Sr. was a cardholder under a corporate company account and was not a consumer as used in the Trust in Lending Act [sic] and used his American Express card primarily for business purposes and not "primarily for personal, family, household, or agricultural purposes". And on the further ground that the alleged violations of Louisiana law do not reach the jurisdictional minimum amount of TEN THOUSAND AND NO/100 ($10,000) DOLLARS.

CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY

BY /s/ Frank Liberto
PETER FRANK LIBERTO
Attorneys for
American Express Company
1500 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone: (504) 568-1320

CERTIFICATE

I hereby certify that a copy of the above and foregoing pleading has been this day forwarded to all counsel of record by depositing a copy thereof, postage prepaid, in the United States mail on this 11 day of Jan. 1977.

CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY

By: /s/ Frank Liberto

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-3660

SECTION "D"

LOUIS R. KOERNER, SR.,
Plaintiff

versus

THE AMERICAN EXPRESS COMPANY,
Defendant

Filed: _____ _____
Deputy Clerk

STATEMENT OF UNCONTESTED
MATERIAL FACTS

1.

On or about November 16, 1965 The John E. Koerner and Company, Inc. corporation made application for a company account American Express card, a copy of which application is attached as Exhibit 1.

2.

On or about November 16, 1965 Louis R. Koerner made application for a supplementary credit card on the company account in the name of Louis R. Koerner. The application for the supplementary credit card of the company account is attached as Exhibit 2.

3.

All of the billing was to The John E. Koerner Company as a business account. The documents which show this are attached as Exhibit 3.

4.

The same documents indicate that most of the charges were for hotels, airlines, and rent-a-cars, items used primarily in business transactions.

5.

The account of Louis R. Koerner, Sr., was a commercial or business account and was billed to John E. Koerner and Company, Inc.

6.

The amount in dispute as alleged in paragraph 10 of the Complaint is FIFTY-FIVE AND NO/100 ($55.00) DOLLARS.

7.

No special damages have been alleged in the Complaint.

CHAFFE, MCCALL PHILLIPS,
TOLER & SARPY

BY /s/ Frank Liberto
PETER FRANK LIBERTO
Attorneys for The American
Express Company
1500 First N.B.C. Building
New Orleans, Louisiana

39

Please type or print information and mail this form to American Express Company, P. O. Box 1855, Church Street Station, New York 8, N. Y.

American Express

APPLICATION FOR CREDIT CARD | COMPANY ACCOUNT

IT IS NOT NECESSARY TO SEND THE ANNUAL FEE OF $10.00. WE WILL BILL YOU FOR THIS AMOUNT UPON ISSUANCE OF THE CARD.

B1

COMPANY NAME JOHN E. KOERNER & CO., INC. TELEPHONE 525-2903

MAIN OFFICE ADDRESS 740 MAGNOLIA STREET (Street) NEW ORLEANS (City) 70150 (Zone) LOUISIANA (State)

NATURE OF BUSINESS WHOLESALE FLOUR JOBBERS YEARS ESTABLISHED 1907

IF BILLING IS TO GO TO A BUSINESS ADDRESS OTHER THAN MAIN OFFICE ADDRESS PLEASE SPECIFY

ADDRESS (Street) (City) (Zone) (State or Country)

DOES YOUR COMPANY NOW HOLD ☐ HAVE YOU PREVIOUSLY APPLIED FOR ☐ OR HAVE YOU PREVIOUSLY HELD ☐ AN AMERICAN EXPRESS CREDIT CARD

ACCOUNT NUMBER

COMPANY BANK REFERENCE (BE SURE TO INCLUDE STREET ADDRESS)

BANK WHITNEY NATIONAL BANK STREET ADDRESS P. O. BOX 61260 CITY & STATE NEW ORLEANS, LA.

BANK HIBERNIA NATIONAL STREET ADDRESS CARONDELET & GRAVIER CITY & STATE NEW ORLEANS, LA.

CREDIT REFERENCES (SHOW NAME AND ADDRESS) INTERNATIONAL MILLING CO., GREENVILLE, TEXAS

RODNEY MILLING CO., 1550 WEST 29th. ST., KANSAS CITY, MO. 64108

INDIVIDUAL AUTHORIZED TO RECEIVE AN AMERICAN EXPRESS CREDIT CARD IN COMPANY'S NAME

SC1 KCEP 09 135 4084 5

Leave above spaces blank (For Office Use Only)

NAME JOHN (First) E (Middle) KOERNER, JR. (Last) AGE 57 SPOUSE'S NAME Katherine (First Name)

HOME ADDRESS 3609 STATE ST. DRIVE, N. O. (Street) (City) 70125 (Zone) LOUISIANA (State or Country)

TELEPHONE UN. 6-2613 YEARS AT ADDRESS 35 YRS POSITION IN COMPANY PRESIDENT ANNUAL EARNINGS

The undersigned individual and company join in this application and assume joint and several liability for all charges incurred prior to return of Credit Card(s) issued pursuant hereto. The undersigned agree(s) to the terms and conditions accompanying the Credit Card, if this application is accepted and a Credit Card issued.

CARD ISSUED

SIGNATURE OF INDIVIDUAL APPLICANT Jno. E. Koerner Jr. DATE 11/23 11/16/65

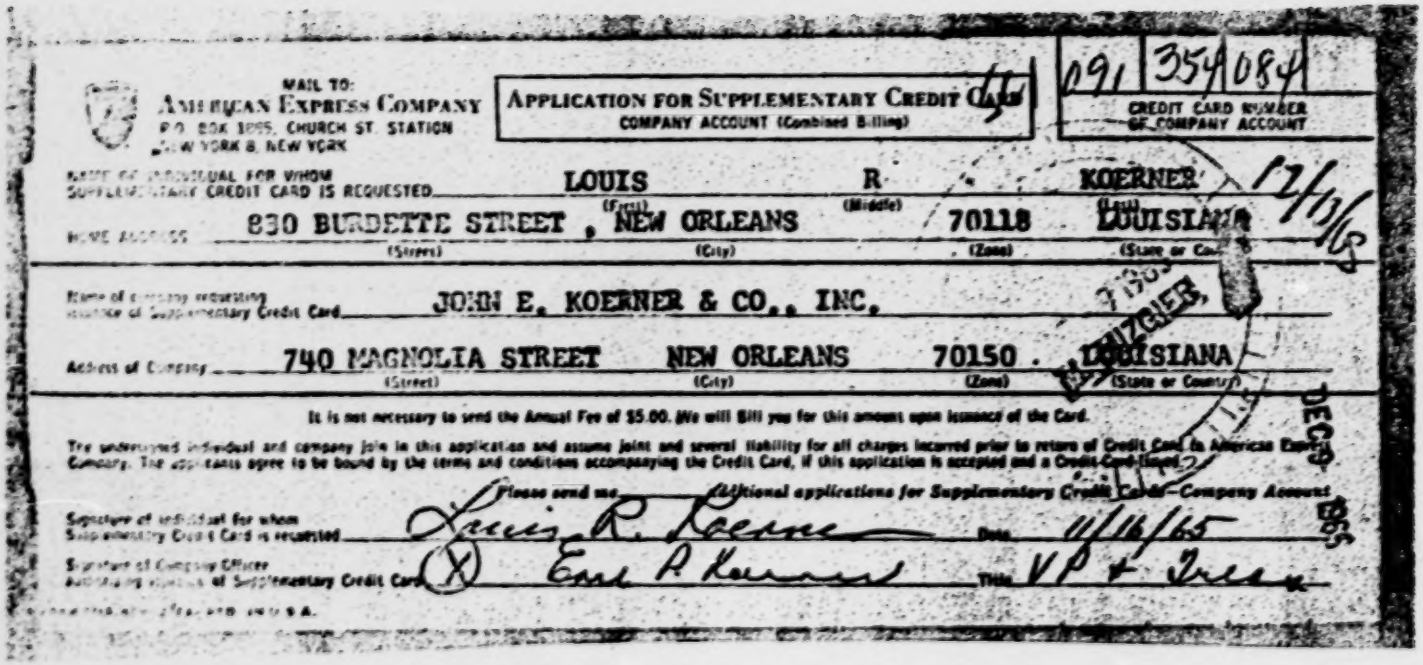
COMPANY ACCOUNT AUTHORIZATION DEC 1 1965 Earl P. Koerner V.P. & Treas. Signature of Authorizing Officer Title

21

Please send me _____ additional applications for Supplementary Credit Cards—Company Account

EXHIBIT 1

27a



MAIL TO:
AMERICAN EXPRESS COMPANY
P.O. BOX 1595, CHURCH ST. STATION
NEW YORK 8, NEW YORK

APPLICATION FOR SUPPLEMENTARY CREDIT CARD
COMPANY ACCOUNT (Combined Billing)

091 354084
CREDIT CARD NUMBER OF COMPANY ACCOUNT

NAME OF INDIVIDUAL FOR WHOM SUPPLEMENTARY CREDIT CARD IS REQUESTED: LOUIS (First) R (Middle) KOERNER (Last)

HOME ADDRESS: 830 BURDETTE STREET (Street), NEW ORLEANS (City) 70118 (Zone) LOUISIANA (State or Co...)

12/15/65

Name of Company requesting issuance of Supplementary Credit Card: JOHN E. KOERNER & CO., INC.

Address of Company: 740 MAGNOLIA STREET (Street) NEW ORLEANS (City) 70150 (Zone) LOUISIANA (State or Country)

It is not necessary to send the Annual Fee of $5.00. We will Bill you for this amount upon issuance of the Card.

The undersigned individual and company join in this application and assume joint and several liability for all charges incurred prior to return of Credit Card to American Express Company. The applicants agree to be bound by the terms and conditions accompanying the Credit Card, if this application is accepted and a Credit Card issued.

Please send me ____ additional applications for Supplementary Credit Cards—Company Account

Signature of individual for whom Supplementary Credit Card is requested: Louis R. Koerner Date: 11/16/65

Signature of Company Officer Authorizing Issuance of Supplementary Credit Card: (X) Earl A. Kerner Title: VP & Treas.

DEC 8 1965

EXHIBIT 2

[Exhibit 3 is not included in the Joint Appendix.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-3660

SECTION "D"

LOUIS R. KOERNER, SR.,
Plaintiff

versus

THE AMERICAN EXPRESS COMPANY,
Defendant

OPPOSITION TO STATEMENT OF UNCONTESTED MATERIAL FACTS

1. Admitted.

2. Admitted.

3. Admitted.

4. Denied. Plaintiff does not know what is meant by the phrase "most of the charges" indicates, and further states that since there has been no discovery to establish what each charge was for, the statement is a mere conclusion.

5. Denied. This is a conclusion of law which is at issue between the parties.

6. Denied. The amount in dispute is set forth in the prayer of plaintiff's petition, $25,000.00 actual damages for himself and such damages as may be due to each of the sub-class members, plus damages for the entire class in accordance with the Consumer Credit Protection Act.

7. Denied. Plaintiff does not understand what defendant means by "special damages".

Further, it is plaintiff's position that the material facts as set forth in defendant's statement, as will be shown, in the memorandum submitted herewith, is not complete.

KOERNER & LAMBERT
A Professional Law Corporation

BY: _____

STEPHEN M. BERNSTEIN
730 Camp Street
New Orleans, Louisiana 70130
581-9569

CERTIFICATE

I HEREBY CERTIFY That a copy of the foregoing statement has been sent to counsel for all interested parties, by placing same in the United States mail, postage prepaid, properly addressed, this — day of ———, 1977.

_____

STEPHEN M. BERNSTEIN

MINUTE ENTRY
HUGHES, M.
MARCH 30, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-3660

SECTION D

LOUIS R. KOERNER, SR.

versus

THE AMERICAN EXPRESS COMPANY

A conference in this matter was held on March 30, 1977. The following counsel attended:

Louis R. Koerner, Jr., Esq. 581-9569
Attorney for plaintiff

Peter Frank Liberto, Esq. 568-1320
Attorney for defendant

A—It was stipulated by plaintiff that the specific purpose of the trip which gives rise to the specific instance bringing about this action was a business trip.

B—Mr. Koerner also stipulates that plaintiff has not sought specific medical attention and that any aggravation of plaintiff's heart condition is at present indeterminable, and further that that claim would not reach judicial amounts and that except for pendant jurisdiction in the Truth and Lending matter, the federal court would not otherwise have jurisdiction of that claim.

C—Due to a misunderstanding on the part of the defendant, no formal discovery was entered into.

D—Discovery will now be entered into as limited by previous Minute Entry.

Further *conference* will be *held* before Magistrate Hughes on Wednesday, *April 27, 1977, at 2:30 P.M.*

/s/ Kenneth C. Hughes
KENNETH C. HUGHES
United States Magistrate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-3660

SECTION "D"

LOUIS R. KOERNER, SR.

vs.

THE AMERICAN EXPRESS COMPANY

Filed: _____ _____
Deputy Clerk

INTERROGATORIES

INTERROGATORY 1

With respect to named plaintiff's trip from New Orleans to San Antonio on Eastern Flight No. 554 on September 28, 1976, the day the American Express card was withdrawn, please state:

a. Whether said trip was conducted for business purposes.

b. Whether said trip was entered as a business expense for purposes of income tax.

c. Who bore the expense of that air fare.

d. Whether said air fare was charged to any client or business account.

INTERROGATORY 2

Since the above incident occurred on September 28, 1976, a Tuesday approximately at noon, state whether named plaintiff was acting during the course of his work

day or whether named plaintiff was on leave from work for personal reasons.

INTERROGATORY 3

With respect to the dispute regarding the amount alleged in paragraph 10 of the complaint totaling some $55.00, list:

a. Each transaction involving only named plaintiff's expenses which were incurred in leading to his part of the $55.00 dispute.

b. With respect to each transaction listed in response to part "a" of this interrogatory, state whether each transaction was for business purposes or personal consumer purposes.

INTERROGATORY 4

With respect to the $3.00 debit included in the billing for July 29, 1975 (encircled on Exhibit 1-a) for air flight insurance for a Delta flight for which a ticket was issued July 7, 1975, in the amount of $83.10 (American Express document encircled identifying the purchase on Exhibit 1-b), please state:

a. Whether said trip was conducted for business purposes.

b. Whether said trip was entered as a business expense for purposes of income tax.

c. Who bore the expense of that air fare.

d. Whether said air fare was charged to any client or business account.

INTERROGATORY 5

With respect to the $3.00 debit included in the billing for August 26, 1975 (encircled on Exhibit 2-a) for air

flight insurance for a Delta flight for which a ticket was issued August 4, 1975 in the amount of $46.74 (American Express document encircled identifying the purchase on Exhibit 2-b), please state:

a. Whether said trip was conducted for business purposes.

b. Whether said trip was entered as a business expense for purposes of income tax.

c. Who bore the expense of that air fare.

d. Whether said air fare was charged to any client or business account.

INTERROGATORY 6

With respect to the $3.00 debit included in the billing for September 25, 1975 (encircled on Exhibit 3-a) for air flight insurance for a Delta flight for which a ticket was issued September 9, 1975 in the amount of $46.74 (American Express document encircled identifying the purchase on Exhibit 3-b), please state:

a. Whether said trip was conducted for business purposes.

b. Whether said trip was entered as a business expense for purposes of income tax.

c. Who bore the expense of that air fare.

d. Whether said air fare was charged to any client or business account.

INTERROGATORY 7

With respect to the $3.00 debit included in the billing for October 28, 1975 (encircled on Exhibit 4-a) for air flight insurance for a Texas International flight for which a ticket was issued on October 3, 1975 in the

amount of $41.37 (American Express document encircled identifying the purchase on Exhibit 4-b), please state:

a. Whether said trip was conducted for business purposes.

b. Whether said trip was entered as a business expense for purposes of income tax.

c. Who bore the expense of that air fare.

d. Whether said air fare was charged to any client or business account.

INTERROGATORY 8

With respect to the four $3.00 debits for flight insurance in conjunction with transactions of named plaintiff (listed in Interrogatories 4-7), please state:

a. Which of the above four transactions contributed to the $55.00 billing dispute as alleged in paragraph 10 of the complaint.

b. List each and every additional transaction of named plaintiff which contributed to the $55.00 billing dispute as alleged in paragraph 10 of the complaint.

c. State as to each transaction listed in response to part "b" of this interrogatory whether it was for commercial or business purposes or for non-business purposes.

INTERROGATORY 9

With respect to each personal check of named plaintiff in payment for transactions with American Express, state:

a. The identity of the transaction or transactions which each payment covered.

b. List all documents supporting the personal nature (as opposed to business purposes) of each above transaction.

INTERROGATORY 10

With respect to the correspondence written to the American Express Company concerning the billing dispute alleged herein, state:

a. Whether all but one letter written to American Express was written on John F. Koerner and Company paper.

b. Whether all but one letter was written over the name of Mrs. L. Thomas, who is the bookkeeper for John F. Koerner and Company.

Respectfully submitted,

CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY

BY: /s/ Frank Liberto
PETER FRANK LIBERTO
Attorneys for
American Express
1500 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone: 568-1320

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 31st day of March, 1977, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed, and first class postage prepaid.

/s/ Frank Liberto

[The Exhibits referred to in the Interrogatories are not included in this Joint Appendix.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-3660

SECTION "D"

LOUIS R. KOERNER, SR.

VS.

THE AMERICAN EXPRESS COMPANY

ANSWERS TO INTERROGATORIES

INTERROGATORY 1

a. The trip was conducted for business purposes solely.

b. The trip was entered as a business expense for purposes of income tax.

c. John E. Koerner & Company, Inc. bore the expense of that air fare.

d. The air fare was charged on John E. Koerner Company Bank Americard and not charged to any other client or business account.

INTERROGATORY 2

On Tuesday, approximately at noon, I was acting during the course of my work and was not on leave from for any personal reasons.

INTERROGATORY 3

On July 29, 1975, a $3.00 charge for insurance.

On August 25, 1975, there was another $3.00 charge.

On September 25, there was a $6.00 charge, however, there was a $3.00 credit for this amount which leaves a balance of $3.00 on September 25th.

On October 28th, there was $6.00 charge.

On December 23rd, there was a $20.00 charge for Mr. John E. Koerner's card which was returned and for which no credit was ever given.

On August 26th, I deducted an error, which was a $20.00 charge for a card of Ralph E. Koerner. They gave me credit for this card and when I paid the bill, I deducted another $20.00. In other words, I took the credit twice, which was my error. On November 26, 1976, we were given credit which left a balance of $55.00. The last statement which we received shows a $55.00 balance that we owe. So on November 26, instead of crediting our cards with $65.00, they just credited it, I never did send them a check, they credited us for $54.45 which leaves a balance of $.55, and we have received no further statements.

INTERROGATORY 4

a. The trip was conducted for business purposes.

b. The trip was entered as a business expense for purposes of income tax.

c. John E. Koerner Company, Inc. bore the expense of that air fare.

d. The said air fare was not charged to client or business account and was solely paid for by John E. Koerner Co., Inc.

INTERROGATORY 5

Same as the answer to Interrogatory No. 4.

INTERROGATORY 6

Same as the answer to Interrogatory No. 4.

INTERROGATORY 7

Same as the answer to Interrogatory No. 4.

INTERROGATORY 8

Please see the answer to Interrogatory No. 3.

Further answer to Interrogatory No. 8, on July 29th, there was a $3.00 charge.

On September 25th, there was a $6.00 charge, $3.00 of which was credited.

On October 28th, there was a $6.00 charge.

Each trip was for business purposes only.

INTERROGATORY 9

The check of September 12, 1972, was for dinner for my wife and I at the Mariot Hotel.

The check for June 4, 1973, I have no record of what it covered.

The check for May 13, 1975, for $22.00, I have no record of what it covered.

The check of September 12, 1975, covered personal expenses including air fare and some meals in connection with taking my daughter to a business convention. It also covered her air fare.

The check of April 8, 1976, covered a purchase at Abacrombe and Fitch of $37.28 and air fair to Houston, Texas for my wife and I to attend my sister's funeral.

The check of September 2, 1976, covered the purchase of shirts at McKabb Department Store.

The check of January 6, 1976, to the best of my memory covered purchases made in Shannon Airport while I was on a vacation.

INTERROGATORY 10

To the best of my knowledgment, all letters were written on John E. Koerner and Company stationery with the exceptions of those letters which may have been written by my attorneys.

KOERNER & LAMBERT
A Professional L..w Corporation

/s/ Stephen M. Bernstein
STEPHEN M. BERNSTEIN
730 Camp Street
New Orleans, Louisiana 70130
(581-9569)

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, The undersigned authority, personally came and appeared Louis R. Koerner, Sr. who, after being first duly sworn did depose and say that the above answers are true and correct to the best of his ability, knowledge and belief.

/s/ Louis R. Koerner, Sr.
LOUIS R. KOERNER, SR.

Sworn to and subscribed to this 4th day of May, 1977.

/s/ [Illegible]
Notary Public

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing answers to interrogatories have been delivered to opposing counsel by hand this 3rd day of May, 1977.

/s/ Stephen M. Bernstein
STEPHEN M. BERNSTEIN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-3660

SECTION D

LOUIS R. KOERNER, SR.

versus

THE AMERICAN EXPRESS COMPANY

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

This matter has been referred to me as United States Magistrate for Report and Recommendation under provisions of 28 U.S.C. § 636(b)(1)(B) as a Motion for Summary Judgment.

Other motions have been filed by the parties including a motion to defer determination of defendant's motion to dismiss and for summary judgment until completion of discovery. By the making of this Report, we suggest denying that motion.

This action is a complaint for damages with a request for jury trial. It is presented as a class action based upon the provision of 15 U.S.C. § 1601, *et seq.*, known as the Truth in Lending Act. Jurisdiction is also alleged under 28 U.S.C. § 1332, diversity of citizenship. Petitioner is a resident of Louisiana, and THE AMERICAN EXPRESS COMPANY is a foreign corporation. Petitioner alleges the diversity action will exceed the amount of $10,000.

The argument of counsel was heard on February 9, 1977, on the Motion for Summary Judgment.

The first issue is the application of the Truth in Lending Act. Mover-defendant AMERICAN EXPRESS argues that provisions of the Truth in Lending Act do not apply in this instance because it was not designed to apply to business or governmental credit. He cites the provisions of Regulation Z and the exempted transactions of subsection 226.3, which states:

> "This part does not apply to the following: (a) business or governmental credit. Extensions of credit to organizations including governments, or for business or commercial purposes, other than agricultural purposes."

The credit application states specifically that the application for credit card is for company account and it is to be issued "in company's name". AMERICAN EXPRESS argues that the mere fact that the application was made for a company account and was to be issued to a company, specifically John E. Koerner and Company, all the transactions made for that account are excluded. Petitioner, KOERNER, argues that the exemption is too broad and applies only where the use of the account is for specific business purposes. [Regulation "Z" covering this interpretation is 15 United States Code 1603.]

The following issues are not in contest:

1—Credit card was issued as a business credit card;

2—It was used by Mr. Koerner, who is president of the cardholding company;

3—The issuance of a supplemental card to Mr. Koerner personally was a supplement to the card issued by THE AMERICAN EXPRESS COMPANY.

If the issue turns on the use to which the card is put regardless of the user's identity, then the matter will

be determined by the facts of the case and whether they are applicable to the provisions of Truth in Lending Act.

Following the original hearing, this Court determined that certain stipulations should be entered into and, if necessary, limited to discovery.

Plaintiff stipulated that the purpose of the trip which gave rise to the incident was a business trip, not a pleasure trip. He further stipulated that the tort claim does not reach the jurisdictional amount. The answers to interrogatories support those stipulations. [See exhibits attached.]

The court in *Kenney* v. *Landis Financial Group, Inc.*, 376 F.Supp. 852, (N.D. Iowa, Cedar Rapids Division, 1974), CCH Consumer Credit Guide ¶ 98, 788, denied jurisdiction to petitioner's claim under the Truth in Lending Act. The court said:

> "On the basis of these facts, and from reviewing the entire record, it is the court's view that plaintiff has failed to establish by a preponderance of the evidence that the *transaction* in question was a consumer credit transaction and not one for business or commercial purposes. Accordingly, this action must be dismissed for lack of jurisdiction and all summary judgments heretofore entered should be vacated." (emphasis ours)
>
> *Kenney* v. *Landis*, 376 F.Supp. 853-854

Obviously what that court used as a criterion in its determination was the purpose for which the money was being borrowed by Kenney, not whether Kenney was in fact a business man. Further, the editorial preface to the opinion in CCH states clearly that the United States District Court refused to sustain an action for alleged Truth in Lending violations of the disclosure requirements for prepayments, rebates and delinquency charges

because the court had no jurisdiction over a *transaction that was intended for a business or commercial purpose*, rather than for personal, family or household *purposes*. It would then appear that the intent is the criterion. While not referring to this issue specifically, the court in *Thomas* v. *Meyers-Dickson Furniture Co.*, 479 F.2d 740, 5 Cir. 1973, stated: ". . . We deem it sufficient to iterate that 'exceptions' not mentioned in the Act should not be read into it", in referring to the Truth in Lending Act.

In apparent support of this position, the Tenth Circuit in *Redhouse* v. *Quality Ford Sales, Inc.*, 511 F.2d 230 (1975), stated:

> "There was an unresolved question as to whether Redhouse purchased his pick-up for personal use or for business use (and therefore exempt from the Act)."

The court went on to say:

> "In answer to the acknowledgment that if the Redhouse truck was purchased for business it would be outside the Act, the trial court noted:
>
> > It sounds to me as though you have an issue of fact . . ."

Further in the same ruling, the court feels obliged to state:

> "Redhouse submitted an affidavit that he intended to and did use the vehicle for personal, family and household needs. Defendant relied on the affidavit of a salesman which is not in the record but which is said to allege that Redhouse told the car salesman he wanted the truck for his work. Defendant Redd offered to testify to the statement, but this was excluded as hearsay because Redhouse does not speak English and the alleged statement was made through an interpreter who was not called as a witness."

The whole issue of whether the vehicle was for personal or business *use* appears to have impressed the court.

The Tenth Circuit in a rehearing *en banc* did not disturb this position (523 F.2d 1).[1]

In *Adema* v. *Great Northern Development Co.*, 374 Supp. 318, 1873, N.D. Ga., the court notes at length:

> "Alternatively, the complaint seeks relief under the provisions of the Consumers Credit Protection Act (Truth in Lending Act), 15 U.S.C. § 1601 et seq. The Act does not apply to credit extensions 'for business or commercial purposes'. 15 U.S.C. § 1603(1). By the plaintiff's own admission (Adema Dep. at pp. 42, 152, 161), the Treasure Lake lots he purchased were for investment purposes and not for personal use. Consequently, he would not be a consumer within the meaning of the Act. In defining the word 'consumer', 15 U.S.C. § 1602(h) provides:
>
> > The adjective 'consumer', used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes."

Mover in his memorandum cites *Sapenter* v. *Dreyco, Inc.*, 362 F.Supp. 871, (E.D. La. 1971), aff'd 450 F.2d

---

[1] The Fifth Circuit quoted *Redhouse* approvingly on the issue of summary judgment, stating:

> "We are fully cognizant that summary judgment is drastic relief which must be applied with caution and that the pleadings of the party opposing it are to be liberally construed."

Solomon v. *Houston Corrugated Box Co., Inc.*, 526 F.2d 389, 1976.

941 (5th Cir. 1971), cert. denied 406 U.S. 920, 92 S.Ct. 1775, 32 L.Ed.2d 120 (1972), in which Judge Cassibry states:

> "The Truth-in-Lending Act exemption of credit transactions 'for business or commercial purposes' does not distinguish between full time and part time businesses. Furthermore, the Truth-in-Lending Act was enacted as part of the Consumer Credit Protection Act of 1968, and specifically deals only with consumer credit transactions, characterized as 'one in which the party to whom credit is offered or extended is a natural person, and the money, property or services which are the subject of the transaction are primarily for personal, family, household or agricultural purposes.' "
>
> At p. 873

The Court states further:

> "This argument overlooks, however, the facts that 15 USC Section 1603(1) exempts all '[c]redit transactions involving extensions of credit for business or commercial purposes' from coverage of the Truth-in-Lending Act. In determining whether a particular transaction is exempt, therefore, the purpose of the transaction or extension of credit is controlling, not the property on which the security interest is retained. Thus, in the instant case, the extension of credit is for a business purpose and Section 1635 (a) is of no avail to plaintiffs even though the mortgage was placed on their residence."
>
> At p. 874.

I find plaintiff's transactions with defendant were of a business or commercial nature and not personal. Plaintiff does not have a cause of action pursuant to 15 U.S.C. § 1601 *et seq.* The tort action falls for lack of jurisdictional amount under 28 U.S.C. § 1332.

Recommendation

I recommend that Motion for Summary Judgment of defendant THE AMERICAN EXPRESS COMPANY be GRANTED.

New Orleans, Louisiana July 22, 1977.

/s/ Kenneth C. Hughes
KENNETH C. HUGHES
United States Magistrate

[The Exhibits referred to in the Report and Recommendation of the United States Magistrate are not included in this Joint Appendix.]

V. Order of Supreme Court granting Petition for Writ of Certiorari

PREVIOUS PAGE WAS BLANK

[Order of the Supreme Court filed January 12, 1981]

80-202

LOUIS R. KOERNER, SR.

v.

THE AMERICAN EXPRESS COMPANY

The petition for a writ of certiorari is granted.

PREVIOUS PAGE WAS BLANK